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Trauma and Free Speech in Higher Education:
Do Trigger Warnings Threaten First Amendment Rights?

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Abstract

This paper considers the constitutional questions posed by trigger warnings in higher education. Specifically, I look at the relationship between trigger warnings and First Amendment rights. I show that trigger warnings, a hot button issue in academia and the cultural discourse today, are neither exempt from constitutional concerns nor do they automatically violate First Amendment rights.

The Court often interprets the First Amendment's central goal as promoting the pursuit of truth through the uninhibited free flow of ideas. The Court defines institutes of higher education as crucial spaces to forward this pursuit. Do trigger warnings aide or hinder the pursuit of truth in the college classroom? I explore two legal frameworks to consider this question. The first considers trigger warnings as a prior restraint on a professor's academic freedom, which is protected under the First Amendment. The second considers trigger warnings as a constitutionally permissible form of accommodation for women in higher education.

This paper concludes with suggestions of how trigger warnings can be effectively and legally used in higher education. Trigger warnings can risk infringing on a professor's First Amendment rights; trigger warnings can also be benign and, sometimes, considerate teaching tools. A balance is possible between the two.

Introduction

The Supreme Court must constantly reapply the First Amendment as new forms of communication and new restrictions on speech emerge. The Court has considered the relationship between political speech and money (*Citizens United v. Federal Election Committee* (2010))¹, permissible restrictions on speech on the internet (*Reno v. American Civil Liberties Union* (1997))² and whether college speech codes violate the First Amendment (*Doe v. University of Michigan* (1989)).³ Trigger warnings are one of the newest First Amendment questions. No Court has yet considered their constitutionality, but trigger warnings have hit a cultural nerve. Many critics of trigger warnings are concerned about if and how they restrict the academic freedom protected under the First Amendment.

Discussions of trigger warning policies have cropped up at a number of prominent schools including University of Michigan, Wellesley College, Oberlin College, University of California at Santa Barbara, and Rutgers University. Dozens of major publications have published impassioned op-eds and analyses of trigger warnings. They are and continue to be fiercely debated in academic circles. Some argue these warnings violate the First Amendment, others that they are a benign and responsible teaching tool. However, there is little scholarly analysis of trigger warnings in a constitutional context.

This paper uses two legal frameworks to try to bridge the gap between speculation and law. The first framework considers trigger warnings as a prior restraint on a professor's academic freedom and, consequentially, a violation of a professor's First Amendment rights. The second legal framework considers trigger warnings as a constitutionally permissible accommodation for female students in higher education.

¹ *Citizens United v. Federal Election Commission*, No. 08-205, 558 U.S. 310 (2010)

² *Reno v. American Civil Liberties Union*, No. 521 U.S. 844 (1997)

³ *Doe v. University of Michigan*, No. 89-71683, 721 F. Supp. 852 (E.D. Mich 1989)

What are Trigger Warnings?

Trigger warnings are written or verbal notices before potentially disturbing or upsetting material is read or shown. They first appeared on the internet, such as on feminist blogs, in the 1990s. These warnings have become not uncommon in institutions of higher education in the past several years. In higher education one of their original rationals was to accommodate students with post-traumatic stress disorder. Trigger warnings acted as a heads-up for material with which students may have had a potentially traumatic experience, allowing these students to prepare for or, in some cases, avoid confronting the material. Being triggered does not have a singular definition in this discourse. Being clinically triggered is sometimes defined as a physical reaction such as a panic attack, a depressive episode, or disassociation. Other definitions do not rely on a physical response, only that a student feels unsafe and/or that they cannot effectively engage with the triggering content. Though their rationale differs depending on who one talks to, the warnings almost always have a place in offering control and, proponents argue, greater access to education to those with traumatic experiences.

Oberlin College's and the University of California at Santa Barbara's policies are two of the most infamous suggestions of trigger warning policies. Oberlin's policy, which was crafted by a task force of both faculty and students and which was approved by officials in the administration, created a "guide" for professors, instructing them to be cognizant of how "racism, classism, sexism, heterosexism, cissexism, ableism, and other issues of oppression" can affect class discussions and to "remove triggering material when it does not contribute directly to the course learning goals."⁴⁵ If the potentially triggering material must be included, teachers are encouraged to tell the students at the beginning of class what kind of triggering ideas will be presented in the work. The professor is also encouraged to provide an alternative assignment for

⁵ Oberlin College's Office of Equity Concerns, "Faculty Rules, Pedagogical Issues and Sexual Misconduct." *Support Resources for Faculty*. accessed Nov 1, 2014. Web. <http://new.oberlin.edu/office/equity-concerns/sexual-offense-resource-guide/prevention-support-education/support-resources-for-faculty.dot>

students who find the triggering material too upsetting. Oberlin's policy was not a mandate, but a list of suggestions. Around the same time, the University of California at Santa Barbara's student senate unanimously passed a resolution requiring professors to use trigger warnings for all in-class material. The students that sponsored the senate bill compared trigger warnings to the rating systems for movies. This mandatory trigger warning policy was intended to help students with both diagnosed and undiagnosed post-traumatic stress disorder.

These policies (both of which were eventually shelved by the school's general faculty) and other calls for trigger warnings in varying forms ignited those in and outside the world of academia. Most of this heated discussion focuses on the pedagogical and cultural implications of trigger warnings. Are trigger warning the most flagrant manifestation of political correctness and the coddling of American youth? How does society confront trauma in a world increasingly aware of PTSD, sexual assault, and systematic oppression? What are the best teaching methods?

First Amendment legal analysis adds crucial considerations to this discourse. The law demands that we consider phenomena outside of a particular cultural moment. Unlike science and philosophy, the law cannot always put issues aside until there is more data or awareness, but must address societal phenomena as they arise. The law tries to reduce friction in society.

Methodology

As no Court has considered trigger warnings and their relationship to the First Amendment, this paper relies on precedent set by past First Amendment cases to determine their legality. In the second legal framework, cases on the Constitution's Equal Protection Clause are also considered. I have also interviewed faculty and college students about their experiences in the classroom with trigger warnings and upsetting material. This empirical research does not have a large enough sample size to be statically significant. Instead, it provides descriptive

evidence on the effects of trigger warnings in the classroom, shining light on the following two questions:

1. Do trigger warnings accomplish their intended goal of helping students learn?
2. Do trigger warnings promote a culture that causes professors to self-censor?

As I will show, empirical and seemingly non-legal research are essential and often used when deciding constitutionality. The real world effects of policies and laws, especially those related to the First Amendment, are often evaluated in constitutional cases.

My analysis is not framed around a specific trigger warning policy. This non-specific approach offers greater insight on a phenomena that takes varying, sometimes contradictory forms. Even ardent supporters of trigger warnings disagree or have mixed answers about the rationale behind trigger warnings and how they should be implemented. Varied interpretations of trigger warnings require multiple legal analyses. For example, the constitutionality of a mandatory trigger warning policy is legally distinct from professors merely having the option to use trigger warnings.

My paper first explores why critics argue trigger warnings violate the First Amendment. Next is a summary and analysis of my own research on the empirical effects of trigger warnings. I explore both the results, and how the effects of trigger warnings can be understood using Ronald Dworkin's "concept v. conception" framework. My first legal framework considers trigger warnings as a prior-restraint on a professor's academic freedom. Secondly I consider trigger warnings as an accommodation for women. I argue trigger warnings disproportionately affect women because female students have a far higher rate of surviving sexual assault than male students.

This paper's central challenge is the many legal questions it does not address. How are trigger warnings related to college speech codes? Are the safe spaces trigger warnings create, as some proponents suggest, protected under the Civil Rights Act? How would legality differ at a public versus a private institution? My paper does not have the space to consider these and the many other questions trigger warnings raise.

However, the public verse private university distinction should be at least superficially addressed. At first glance, this distinction appears more relevant to the legality of trigger warnings than it may be in reality. It is true that the Court is far more willing to allow private universities to craft their own educational policies. The Court argues private school's regulations are "in no way dictated by state law or state actors."⁶ When a private institution regulates expression the government is not infringing on free speech. The Court has been far more willing to intervene with state universities, such as the speech codes in *Doe v. University of Michigan* (1989) or the affirmative action cases at University of Michigan in the 2000's.⁷⁸

Still, none of the above rules out the possibility of First Amendment violations at private universities. Private institutions are often sued on constitution grounds. Employees frequently sue private employers under the Constitution's Equal Protection Clause. The US government partially funds or provides grants to many private institutions of higher education, such as need-based financial aide and hefty tax exemptions. Arguably, this funding could translate into a private institution acting as a government speaker. Further, most private universities assert they are places of civil discourse that promote the unimpeded free flow of ideas.⁹ The premium the Court places on academic freedom suggests that it would not automatically dismiss a case brought against a private institution of higher education on First Amendment grounds. Private nor public institutions should write off the First Amendment concerns raised by trigger warnings.

⁶ *Logan v. Bennington College Corporation*, 72 F.3d 1017 (1995)

⁷ *Gratz v. Bollinger*, 539 U.S. 244 (2003)

⁸ *Grutter v. Bollinger*, 539 U.S. 306 (2003)

⁹ Religious institutions' relationship to the First Amendment is more complicated than secular institutions. Freedom of religion is protected under the First Amendment, which allows greater speech restrictions at religious schools. However, no one I know of is arguing that trigger warnings in higher education are constitutional under a religious exemption. Trigger warnings' secular nature largely separates them from any First Amendment concerns that would arise at religious universities.

The First Amendment: Do Trigger Warnings Pose First Amendment Concerns?

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹⁰

The relatively simple language of the US Constitution’s First Amendment belies the complexity of these rights. Differing interpretation abound. What is speech? What is the value of speech? When, if ever, can the government limit an individual’s right to speak? The rationale of the First Amendment—why we need this amendment in the first place—is significant to the discourse on the constitutionality of trigger warnings.

Freedom of expression has never been absolute in America. The Court has long held that restraints on free expression may be “permitted for appropriate reasons.”¹¹ Laws during colonial America punished seditious libel against elected officials. After the ratification of the Constitution, the Sedition Act of 1798 was used to prosecute publishers of “false, scandalous, and malicious writing or writings against the government of the United States”.¹² (The act was rigorously enforced until 1801 when President Thomas Jefferson pardoned all convicted under the act.) The Sedition Act resulted partly from foreign policy tensions between the US and France. Foreign policy concerns continued to spawn infringements on speech into the 20th century. During WWI the Espionage Act outlawed speech intended “to incite, provoke or encourage resistance to the United States.”¹³ The Supreme Court ruled this Act did not violate

¹⁰ "First Amendment". Cornell University Law School Legal Information Institute. Archived from the original on May 3, 2013. Retrieved May 3, 2013.

¹¹ *Elrod v. Burns*, 427 U.S. 347, 360 (1976)

¹² The Alien Act, July 6, 1798; Fifth Congress; Enrolled Acts and Resolutions; General Records of the United States Government; Record Group 11; National Archives.

¹³ Espionage Act of 1917, Act of October 6, 1917, ch. 106, §10(i), 40 Stat. 422, codified at 18 U.S.C. §§ 793-98

the First Amendment in 1919.¹⁴ Today, laws that restrict speech during certain times and at certain places, laws that restrict speech that incites imminent lawless action, and other restrictions are constitutional.

The Supreme Court often references the purpose of the First Amendment to justify constitutional abridgments. Because limits on free speech are sometimes constitutional, the purpose of the First Amendment is not singularly and unequivocally to protect all forms of expression. The most common rationals for the First Amendment include promoting self-government, self-fulfillment and autonomy, and pursuing and discovering truth. The last is most applicable to a legal analysis of trigger warnings.

This paper works off the assumption that higher education is an institutionalized search for truth. Professors and students come together to learn, question, and discover. College admissions sites tout their institutions as spaces for thinking critically, discovering one's passion, and learning about the world. Legal scholars construct higher education as essential for the pursuit of truth. Legal scholar David Rabban argues that "constitutional academic freedom . . . provide professors more protection for professional speech and less protection for unprofessional speech than the free speech clause would afford the same statements by nonacademics" (227).¹⁵ The Courts have argued universities inhabit "a peculiar place in the marketplace of ideas",¹⁶ and have a unique level of protection to preserve an environment of exploration, speculation, and a spirit of free inquiry.

The Court often cites the marketplace of ideas as a model for the pursuit of truth in the USA. Justice Oliver Wendell Holmes first used the concept to defend First Amendment rights in 1919. The search-for-truth rational is partly based in the writing of John Stuart Mill, who articulated this concept in his essay *On Liberty*.¹⁷ John Stuart Mill, a 19th century philosopher

¹⁴ *Schenck v. United States*, 249 U.S. 47 (1919)

¹⁵ Rabban, David M. "A Functional Analysis of 'Individual' and 'Institutional' Academic Freedom Under the First Amendment," *Law and Contemporary Problems*. University of Texas Law School. 1990. Print.

¹⁶ *Keyshian v. Board of Regents*, 255 F.Supp. (1966).

¹⁷ Mill, John Stuart, *On Liberty*. London: Longman, Roberts & Green, 1869. Print.

and economist, envisioned a society where rational individuals could consider and choose from all ideas and forms of expression. As in a free market economy, the demand for the best ideas would drive up the supply of those ideas. Ideas that were not up to snuff would be left by the wayside. All ideas are welcome and necessary in the marketplace, but only the best ideas—the most sensible, the most moral, etc.—survive. The marketplace of ideas is often connected to liberal democracy because it prohibits a central control on discourse. No authority—such as a King or a totalitarian leader—may suppress ideas that contradict their own.

Mill's rationale, a favorite of the Supreme Court's, frequently justifies the protection of speech. In his dissenting but highly influential opinion in *Abrams v. United States*,¹⁸ Justice Holmes argued that the unimpeded free trade of ideas serves the “ultimate good” of democracy. “The best test of truth is the power of the thought to get itself accepted in the competition of the market.”

To critics, trigger warnings restrict the free market place of ideas. Trigger warnings may act as censorship, and offensive or triggering ideas will never make it to the market place. For example, classroom materials described as triggering in my interviews were sometimes deemed unacceptable for the classroom all together. Some students who read a novel that depicted a graphic rape scene in an intro history course argued the book should not be included in future courses; the rape was too triggering. Critics of trigger warnings would argue, if this novel is eliminated from the syllabus for future classes, the work will not reach the classroom, which is an essential component to the market place of ideas at institutions of higher education. The pursuit of truth misses an opportunity to engage with a work because it is too triggering for some students.

Proponents argue trigger warnings even the playing field in the market place of ideas, and so benefit the search for truth. Trigger warnings may create a safer learning environment that enhances class discussion.¹⁹ Trigger warnings offer safety and accommodation to those with less

¹⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

¹⁹ Kang, Jay Caspian. “Trigger Warnings and the Novelists’ mind,” *The New Yorker*. 21 May 2014. Web. Accessed 18 Nov 2014. <http://www.newyorker.com/books/page-turner/trigger-warnings-and-the-novelists-mind>

social power, such as student of color and survivors of sexual assault, allowing them to take full advantage of their education. In a society of drastically differing levels of social power, some voices will be elevated and others drowned out in an unregulated market place of ideas.

Even in a liberal democracy, some legal scholars argue, speech is social power, which the mighty wield to enforce their own version of the truth. This inequality is two fold. First, the speech of subordinated groups is less valued. “Familiar cultural images and long-established legal norms construct the subjectivity and speech of socially subordinate persons as inherently inferior to the speech and personhood of dominate groups” (405).²⁰ The second effect of speech as social power is that some voices are elevated above others. For example, financial means offer a far louder microphone. Both create an unfair market place of ideas. Under this understanding, some expression can be abridged to level the playing field in a society of drastically unequal social power. For example, legal theorists Ronald Dworkin and Catherine MacKinnon argue pornography, a protected form of expression under the First Amendment, enforces male hegemony, which reenforces the status quo of males as the dominant gender.²¹ Protecting pornography protects the unequal distribution of social power. The Court does not directly acknowledge speech as social power, but it has considered the argument that the pursuit of truth does not protect obscene or low-value speech. The majority in *Roth v. United States* argued obscenity was “utterly without social importance” and so was not protected under the First Amendment to the same extent as political speech or other forms of expression that forwarded an argument, or the pursuit of truth.²²

Proponents argue trigger warnings are a restriction on free speech that evens the playing field. The warnings may give control to those with less social power in the college classroom, such as women with traumatic experiences. When subordinated groups feel safe and comfortable

²⁰ White, Lucie E, “Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G,” *Feminist Legal Theory: Readings in Law and Gender*. Ed. Katherine T. Bartlet and Rosanne Kennedy. Boulder: Westview Press, Inc. 1991.

²¹ Balkin, J.M. “Some Realism about Pluralism: Legal Realist Approaches to the First Amendment,” *Duke Law Journal*, vol. 1990, number 3 (June 1990) pp. 375-430.

²² *Roth v. United States*, 354 U.S. 476 (1957).

participating and speaking up, the pursuit of truth benefits. Several students I interviewed spoke of times they could not engage with classroom material because they found the material too upsetting or too triggering. Examples included films depicting eating disorders and substance abuse. The students said they felt cut off from their own education and could not participate in class discussion.

On the other hand, critics argue trigger warnings do not redistribute social power, but impede the search for truth in the college classroom. Professor Gad Saad argues trigger warnings act as a protection from truth. “If the truth might hurt someone's feelings or cause discomfort,” she says sarcastically, “well then we need to cuddle (the student) whilst in a communal fetal position.”²³ Students are demanding unnecessary babying in their college education. Trigger warnings shield us from the discomfort of reality, which prohibits us from fully knowing and analyzing knowledge. It may even keep troubling knowledge out of the classroom.

What is the best way to pursue truth? My two legal frameworks ask whether trigger warnings hinder or hurt this First Amendment goal.

Why Use Empirical Data in a Legal Analysis of Trigger Warnings?

Before describing the results of my empirical research, I want to explain their relevance. Empirical evidence is data gathered by observation and experimentation. In my case, this evidence consists of interviews conducted with students and professors about their experiences with trigger warnings in classrooms of higher education.

This data shines light on the following questions:

²³ Saad, Gad. “Trigger Warning: I’m About to Critique Trigger Warnings,” *Huffpost College*. 25 May 2015. Accessed: July 2015. Web. http://www.huffingtonpost.com/gad-saad/trigger-warning-i-am-abou_b_6604686.html

1) Do trigger warnings promote an environment where professors, especially those without tenure status, self-censor the material they teach?

2) Do trigger warnings accomplish their intended purpose of helping students learn?

Most legal scholars believe the text alone is not enough to interpret the Constitution (543).²⁴ Constitutional principles, original intent or history, court precedent, contemporary values, and other factors are considered to determine legality. Today empirical evidence as well has become a central part of legal analysis (1201).²⁵ The question is not whether empirical evidence has a place in constitutional analysis, but in what specific cases and to what extent.

Robert Dworkin's essay "Constitutional Cases"²⁶ offers an apt framework to analyze the role of empirical questions in constitutional cases. Dworkin argues that "reasonable men of good will differ when they try to elaborate on, for example, the moral rights that the due process clause or the equal clause bring into law" (133). The same is true of the First Amendment. The First Amendment reads "Congress shall make *no* law abridging the freedom of speech," but, as I discussed earlier, the Court does not interpret this literally (133). To Dworkin, the vagueness or generality of the Constitution's language encourages relying on general concepts of constitutional principles, instead of strictly following specific conceptions of principles. A concept is abstract and general; a conception is the way something is perceived and carried out. Concepts have a more general character while conceptions belong to individuals and limited groups. For example, many agree on the importance of free speech in democracy, but their conception of free speech—what expression is and is not protected—may drastically differ. Dworkin uses the example of fairness: "When I appeal to fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it" (135). Both sides of the trigger warning argument claim their stance is based on the same concept—forwarding the pursuit of truth in the

²⁴Faigman, David L, "'Normative Constitutional Fact Finding: Exploring the Empirical Component of Constitutional Interpretation,'" *University of Pennsylvania Law Review*. Vol. 139, Issue 3. 1991. Print.

²⁵Ho, Daniel E., and Larry Kramer, "Introduction: The Empirical Revolution in Law," *The Stanford Law Review*. Vol 65, Issue 6. 2013. Print.

²⁶ Dworkin, Ronald, *Taking Rights Seriously*. Cambridge: Harvard University Press, 1977. Print.

college classroom and giving students a great education. Their conception of what this looks like differs. Critics argue trigger warnings infringe on academic freedom, while proponents argue that trigger warnings are a mechanism that equalizes the playing field. These stances rely on different conceptions of how speech works in the college classroom. Either can be supported or undermined depending on whether trigger warnings cause professors to self-censor or whether they help students engage in their education.

My research differs from the cases analyzed below; my research is descriptive and anecdotal while the cases below, such as *Brown v. Board of Education*, rely on research with large enough sample sizes to be evaluated quantitatively. The link between my research and this quantitative research is that both involve the effects of policies in legal analysis. Demonstrated effects, whether shown anecdotally, as in my research, or quantitatively both can help decide if a policy is constitutional.

From the First Amendment to the Fourteenth Amendment, the Court considers empirical evidence to analyze concepts. While constitutional concepts remain the same, empirical evidence might lead the court to reinterpret their constitutional conception. *Brown v. Board of Education* (1954), the Supreme Court decision that desegregated public schools, is an example of a landmark overhaul of the Court's previous conception of equality.²⁷ The Court's decision to overturn the separate but equal doctrine relied on empirical evidence that suggested separate can never be truly equal. Separation of grade school children in school "generates a feeling of inferiority (in black children) as to their status in the community." As feelings of inferiority are "intangible," that is they cannot be perceived by the senses, the Court used research data on students' feelings to quantify inferiority. They found, referring to a state case in Kansas, that "segregation with the sanction of law (has) a tendency to (retard) the educational and mental development of Negro children" because the students feel as if they are less than white children. The ruling did not change that the Constitution guaranteed equality to all races under the law.

²⁷ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

Instead, the ruling redefined the conception of equality. Equality now included the intangible effects of segregation.

The landmark First Amendment decision in *Brandenburg v. Ohio* (1969) relied on the effects of speech.²⁸ In this case, the Court reviewed an Ohio statute that criminalized speech at a Ku Klux Klan rally. The speech included videos of marching KKK members and vague statements about “vengeance” for the “white, Caucasian race”. The Court asked if this speech incited imminent lawless action—in this case, violence against other races. Because of the abstractness of the speech, the Court reasoned, the speech could not be tied to resulting violence and so could not be criminalized. Speech can be regulated on its effects, not its causes. Expression that creates abstract possibilities of harm is protected under the First Amendment.

Cantwell v. Connecticut (1940) is another example of the Court dealing with speech’s connection to imminent harm.²⁹ A Jehovah Witness and his two sons went door to door in a heavily Catholic neighborhood, distributing religious pamphlets and playing records, some of which were highly critical of organized religion. One of the sons stopped two men passing on the street and asked if he could play them one of these records. The two men consented, but the record’s anti-Catholic rhetoric incensed them, so much so they wanted to physically attack the father and his sons. Cantwell and his son were charged with distributing religious material without a state-issued license and breaching the peace. The Court ruled the state statute unconstitutional; like in *Brandenburg*, only speech which presents a “clear and present” danger, meaning speech that causes imminent, unlawful action, can be regulated. Cantwell and his sons’ expression did not meet this bar.

The above cases are similar to a case on trigger warnings because both rely on a conception of speech as not private and personal, but something that can cause harm. Whether something causes harm is an empirical question. While in the above decisions the link between speech and harm could not be proven, in *Cantwell* the Court offered an example of where it can.

²⁸ *Brandenburg v. Ohio*, 395 U.S. 444 (1969)

²⁹ *Cantwell v. Connecticut*, 310 U.S. 296 (1940)

Expression that interferes with traffic can be restricted; distracting a driver verbally creates obvious risk of harm. This logic of harm's relationship to speech leads us to ask: Can triggering material in the classroom cause harm to students the state should or must use tools to prevent against? Speech's relationship to harm is central to legal questions on trigger warnings. Empirical evidence shines light on whether there is a tenable connection.

Cantwell provides a second important nuance in the legal relationship between harm and speech; the connection between the two must be general, not partial. In this case, Cantwell's speech upset listeners so much that the two men wanted to "hit" or physically attack Cantwell and his sons. The Court ruled speech cannot be regulated on specific instances of the effects of speech; the effects must be proven to be more general. Just because a group of specific listeners are provoked does not mean the language is "likely to provoke." If trigger warnings help a single student learn better, this must be weighed against whether the use of trigger warnings cumulatively help many students learn. Similarly, if trigger warnings cause a majority of professors to self-censor, it is more likely they can be constructed as a prior restraint on academic freedom.

There are of course shortcomings to relying on quantitative or descriptive data in a field that does not accumulate knowledge in the same way the natural sciences do. Despite rigorous analysis using the scientific method, law can never have absolute principles like geology or physics (766).³⁰ While it cannot be the only factor in the Court's decision making, empirical evidence and questions help fit trigger warnings into the Court's conception of free speech.

My Findings on Trigger Warnings

Over the past 18 months I have conducted 38 interviews with professors, psychologists and students via email, phone and in person about their experiences with and

³⁰ Friedman, Lawrence M. "Law and Society Movement," *Stanford Law Review*. Vol. 38, No. 3 (Feb., 1986), pp. 763-780. Print.

thoughts on trigger warning use in classrooms of higher education. I did not have a single questionnaire, but interviewed participants conversationally, though interviews covered the same general ideas. I do not use any of the interviewees' names or affiliated universities and institutions. Their thoughts do not represent their universities and institutions, but their own opinions and experiences. While more research would be needed to draw any confident conclusions to my two questions,³¹ common trends emerged in my interviews. I will look at three in this section.

1. Trauma is extremely complex; trigger warnings are a limited and flawed way to confront trauma in the classroom.
2. Trigger warnings and the culture it supports disproportionately affect non-tenured professors.
3. Trauma that disproportionately affects women, such as sexual violence, is far more likely to receive a trigger warning than other forms of trauma.

A central observation of my research is that trigger warnings do not exist as an isolated attempt to create accessibility and safety in college classrooms, but are part of larger changes in culture and academia. Trigger warnings are borne not just from an increased awareness of sexual assault and racism on college campuses, but from long shifting changes in how professors and students interact, and a wider move for students' experiences to be included in the classroom.

Trauma in the College Classroom

³¹ As I mentioned before, this evidence is descriptive, not statistical. It is not meant to draw concrete conclusions, but offer descriptive examples that show the effects of trigger warnings in the college classroom.

The heart of the trigger warning debate is how we handle trauma and sensitive material in higher education while still protecting First Amendment rights and the pursuit of truth. Does creating a safe space in the classroom contradict the necessity of teaching sensitive and upsetting material? This question is fraught with challenging questions, starting with: What is trauma? and What is being triggered?

To analyze their effectiveness, we must establish the purpose of trigger warnings. One possible intent is to prevent episodes of “diagnosed and undiagnosed” post-traumatic stress disorder (PTSD), which was the rationale behind the student senate policy on trigger warnings at the University of California at Santa Barbara.¹ “Having memories or flashbacks triggered (by PTSD) can cause the person severe emotional, mental, and even physical distress. These reactions can affect a student’s ability to perform academically,” the resolution reasoned, framing trigger warnings as a tool to combat PTSD.

Defining the intent of trigger warnings as specifically to protect or support students with PTSD has pros and cons. The symptoms of PTSD are readily diagnosable by a primary care physician. In academic circles it is widely recognized as a physical change in brain functioning that is beyond the control of the student, and a medical condition that deserves accommodation. But, while the symptoms are identifiable, students often are not correctly diagnosed because many PTSD symptoms match those of other mental illnesses. Students may be unwilling to come forward with experiences that could have triggered PTSD and many doctors are wary to pry into experiences that are distressing or involve shame and secrecy (Yehuda 108).³² A graduate instructor also pointed out that only students with the resources to diagnostic tools can receive a diagnosis of PTSD, usually students on the far more privileged end of the college classroom. Further, even if there is a clear diagnosis, how can a professor know which students have PTSD? If a student is unwilling to share their diagnoses, it is inappropriate for a professor to interrogate them about possible mental illnesses. The challenges of diagnosing or knowing

³²Yehuda, Rachel. “Current Concepts: Post Traumatic Stress Disorder,” *The New England Journal of Medicine* (2002). Vol. 346, No. 2 January 10, 2002. 108-114.

which students have PTSD might suggest that teachers should label everything with a trigger warning that has the potential to cause PTSD.

While PTSD affects about 8 percent of College students (Read 2),³³ studies show that between 64 percent to 87 percent of us have experienced a traumatic event, depending how a traumatic event is defined (Read 6). If trigger warnings are aimed at every student who has suffered trauma and, consequentially, potentially developed PTSD, it is statistically likely that in the average college class more than half the students could potentially benefit from a trigger warning, increasing the challenge for teachers to label everything with the potential to trigger.

In contrast to the USCB resolution, my following two legal analysis will work off the assumption that trigger warnings are not just intended for students who suffer from PTSD, but are for a wider population of students. Almost all the professors and students I interviewed framed the intent of trigger warnings as not just about protection and accessibility for students with PTSD, but about a far more inclusive understanding of trauma, mental illness, and student experiences. If the intent of trigger warnings is not solely to accommodate students with PTSD, what are they trying to do?

I found no singular intent for trigger warnings in my research, but all explanations and uses were aimed at trying to improve the educational experience of students and further the pursuit of truth in the college classroom. Students who feel safe can engage their engage. They can contribute to class discussion. They can take from and add to academia's ever growing market place of ideas. Again, we're back to whether trigger warnings help or hinder the pursuit of truth. My first legal analysis asks if they hinder the pursuit of truth by causing professors to self-censor. Is there descriptive evidence that trigger warnings create an environment where professors self-censor?

³³Read, J.P., Ouimette, P., White, J., Colder, C., & Farrow, S. (2011). "Rates of DSM-IV-TR trauma exposure and posttraumatic stress disorder among newly matriculated college students." *Psychological Trauma: Theory, Research Practice, and Policy*, 3(2), 148-156.

The Vulnerability of Nontenured Faculty

Trigger warnings seem to unintentionally add to an academic environment that closes down or forces speech onto nontenured faculty. Only about 25 percent of faculty is tenured in higher education today.³⁴ The coveted and increasingly elusive security of tenure was a concern for many of the faculty I interviewed. The ease of dismissing or not renewing the contract of nontenured faculty seemed to play a prominent role in today's higher education environment.

Tenure can depend on student evaluations, especially in liberal arts colleges that emphasize undergraduate teaching. Adverse student evaluations may kill a professor's career. The economy of academia has created a bloated supply of qualified PhDs, especially in the humanities, and little demand. Tenure-track positions are increasingly rare; full-time faculty at universities has dropped over 25% since 1970.³⁵ The nontenured faculty that has replaced this full-time faculty appear more willing to bend to meet students demands, even treating them as "consumers" as well as pupils, as one professor put it, perhaps partly because of these economic realities.

Few nontenured faculty I interviewed said they would self-censor to avoid a student's anger. However, in a *Vox* op-ed that went viral, a professor writing under a pseudonym wrote that he was afraid of his undergraduate students and edited his subject material to avoid upsetting them.³⁶ This professor seemed to validate the fears of critics that trigger warnings would lead to self-censorship. Though one instance does not prove a trend, my research

³⁴ "Trends in Instructional Staff Employment Status: 1975-2011." Graph. *US Department of Education*, IPEDS Fall Survey. Web. Accessed 20 Jan 2015.

³⁵ U.S. Department of Education, National Center for Education Statistics, Higher Education General Information Survey (HEGIS), Employees in Institutions of Higher Education, 1970 and 1972, and "Staff Survey" 1976; Projections of Education Statistics to 2000; Integrated Postsecondary Education Data System (IPEDS), "Fall Staff Survey" (IPEDS-S:87-99); IPEDS Winter 2001-02 through Winter 2011-12, Human Resources component, Fall Staff section; IPEDS Spring 2014, Human Resources component, Fall Staff section; and U.S. Equal Employment Opportunity Commission, Higher Education Staff Information Survey (EEO-6), 1977, 1981, and 1983. (This table was prepared March 2015.)

³⁶ Schlosser, Edward. "I'm a Liberal Professor, and my Liberal Students Terrify Me," [vox.com](http://www.vox.com/2015/6/3/8706323/college-professor-afraid). 3 June 2015. Accessed 3 Nov 2015. Web. <http://www.vox.com/2015/6/3/8706323/college-professor-afraid>

supported that trigger warnings and the atmosphere they enforce seem far more tightly bound to a nontenured professor's teaching methods than to a tenured professor's.

One nontenured professor admitted that, when a student was upset about assigned material involving sexual violence, he wanted to resolve the conflict not only for the student, but because he feared complaints going up the ladder to administration. Tenured professors are rarely fired for the kind of material they teach in class. Actually, I couldn't find a single instance. From my interviews, it sounded like nontenured professors are vulnerable to dismissal after complaints from students are brought to administration. One professor said the number of complaints from students about what professors teach in the classroom had gone up in recent years. Two other professors added, "How do you think grade inflation came about?"

Student complaints against nontenured faculty often come up to administration while complaints against tenured faculty rarely if ever do. The administration usually plays a role in deciding tenure. At Oberlin College for example, the Dean and the Board of Trustees both vote on whether or not to approve a tenure position for a faculty member. Negative pressure from the administration can tip the scales on whether or not a professor is hired.

This is not to say no tenured professors have experimented with trigger warnings, nor that no nontenured faculty hate or embrace them because of their academic merit. But, I believe the vulnerability of nontenured professors is playing at least some factor in not only how they are teaching, but what they are teaching. A nontenured professor explained that when he chose class material it was a choice between fighting a battle with students over the discomfort caused by work or replacing the work with a more abstract text. Among other reasons, he stopped teaching a certain class after a student was upset and angered by a reading, suggesting it should have been removed from the syllabi in favor of a more abstract representation. Another nontenured professor who routinely gives trigger warnings seemed not to support them. Students of his I interviewed said the professor thought of trigger warnings as "stupid," but something he had to do.

Asking professors to use trigger warnings may seem a benign and simple request— alert us when triggering things are about to happen. But, the threat can be heightened if it has administrative backing or strong student support. Even suggestions or requests to use trigger warnings might come to be seen as suggestions not to teach sensitive material at all. This puts nontenured professors in a position of questioning the material they teach. What if they say no to trigger warnings? What if they include material that students think is too triggering? Trigger warnings add to an environment where both professors and students are hyperalert for material that might trigger, re-traumatize, or even just offend students. Teaching is about striking a balance between asking students to confront difficult material and meeting their needs. Without the protection of tenure, professors may lean too far towards the side of safety, which could be seen as self-censorship.

Are Trigger Warnings Effective?

The second question, which is important to both my first and second legal framework, is whether trigger warnings are effective at forwarding the pursuit of truth in the college classroom. The difficulty of knowing what is triggering cripples their effectiveness.

Many I spoke with mentioned the difficulties of defining what is triggering. One student suggested labeled material should be chosen through scientific study. For example, boat loads of research supports that sexual assault, war combat, and torture have lasting emotional impacts that can interfere with living day to day and learning in the classroom. While that seems easy to apply in the classroom— give a trigger warning for content that involves war, sexual assault and torture— identification and unintentional prioritization of trauma complicates the matter.

I did not find that classrooms became spaces overstuffed with verbal and written trigger warnings, but that certain traumas are prioritized. Sexual assault is far more often labeled

triggering than combat and torture. The legal implications that trigger warnings are used most frequently for sexual assault will be analyzed in my second legal framework.

The Scope of Trauma

Trigger warnings intend to benefit students and the college classroom by protecting or supporting those who have experienced trauma. The line between a traumatic experience and an effectively used trigger warning is challenging to prove. Research on trauma's neurological effects still has much ground to cover; what we do know suggests the scope of trauma is huge and difficult to understand, much less treat.

To start with, what triggers? The color white triggers a woman who was tortured and forced to sign a blank white sheet as a confession. A student listed taxidermy when asked what triggered them. Long after cooking breakfast for her rapist, a woman is still triggered by eggs and bacon. Intergenerational trauma is well documented. Students sometimes struggle with the effects of their parents', grandparents' or even great grandparents' experiences, and make these students, who have not had direct experience with the trauma, hypersensitive to certain stressors (Kellermann, N.).³⁷ After a panic attack, many cannot even name what triggered them, outside a feeling.

Many professors first started giving heads up in classes not because the material was triggering, but because it upset conservatively religious students. I heard multiple stories of students not wanting to engage with material because of their faith. One Mormon student refused to watch any R-rated movies in a film studies class because it was against her faith. Conservatively religious students questioned why they had to read about homosexuality. Others had trouble squaring evolution with their own upbringings. As one professor pointed out, religious tolerance or awareness has never been included in trigger warnings policies, even Oberlin College's infamously inclusive one. In classrooms, students are often weary of

³⁷Kellermann, N. (2013). Epigenetic Transmission of Holocaust Trauma, *Isr. J. Psychiatry*, Vol 50, No.1, pp 33-39.

“re-traumatizing” students who have spoken out against a piece of classroom material as too triggering or one that perpetuates antiprogressive thoughts. However, students are less sensitive to students’ religious backgrounds, even intentionally dismissing institutionalized faith and hostilely challenging its validity.

Trigger warnings partly come from a demand for professors and other students to recognize the many experiences— both “wonderful and not so wonderful” as a professor put it— students bring to the classroom. We get into dangerous territory when we prioritize one lived experience—trauma— over another— faith. These two of course don’t have to contradict each other. For example, a professor showing a film about sexual abuse in the Catholic Church included a warning not only for childhood sexual abuse, but also a warning to be aware that this situation does not fully represent the Catholic Church. But, again, we get into a laundry list of experiences and traumas professors have to include. When are there so many warnings that students don’t pay attention to them? When do students stop hearing the deluge of warnings even if the list includes one of their own experiences?

Trigger warnings can never cover all individual triggers or ideas that might upset students. The laundry list of possibly triggering material has not resulted in staggering lists of alerts as some critics have worried, but instead the prioritization of one trauma over another. Trigger warnings are assigned and asked for most frequently for sexual violence. Trigger warnings for expressions of anti-ethnicity and references to mental illness were also prevalent, but still far behind warnings given for sexual violence. Anti-religious expressions, and torture and military combat were rarely given trigger warnings.

Do Trigger Warnings Prepare and Help Students Learn?

Let’s say hypothetically we could identify what will upset a student and give a trigger warning before it. Does it help that student engage in their education? In my research I’ve

certainly heard accounts of trigger warnings being effective. Survivors of trauma could prepare themselves for material and felt safer in the classroom. Even students who did not believe they have triggers were thankful the professor cared about their and their fellow classmates' wellbeing. But, this was far from always the case.

Just labeling something triggering does not always help a student. A professor who says, "Trigger warning: rape" then plows directly into the content can catch a student just as off guard as one who says nothing before the content. Telling someone you will be hit ten seconds before it happens doesn't lessen the blow. Trigger warnings without contextualization also puts students on high alert. Waiting to be triggered can sometimes be a self-fulfilling prophecy.

While some I spoke with swore by them, most supporters approach trigger warnings from the perspective of an ally. Allyship arises out of the discussions of privilege and oppression that are popular on college campuses today. An ally, though not oppressed themselves, is in solidarity with those who suffer from systems of oppression—victims of sexual violence and people of color, for example. An ally is not just sympathetic, but actively fights against these oppressive systems, though they are not the victims of them. In efforts to be a good ally, many students support trigger warnings as a classroom tool. Some of these students can point to times where they might have liked a trigger warning, but not a time where a trigger warning helped them learn or feel safe in a classroom. Instead they might say, "I see how someone else might have needed a trigger warning" or, "If they want a trigger warning, why not just give it to them? What's the big deal?" Efforts to be in solidarity with students that have suffered trauma did not translate into anecdotal evidence of the effectiveness of trigger warnings.

Allyship does not necessarily mean the trauma is being dealt with. Psychologists agree some form of exposure therapy is always the best way to cope with trauma. Survivors who develop avoidance are the most likely to develop PTSD and have the trauma interfere with their daily lives. A psychologist I interviewed argued trigger warnings unintentionally increase avoidance because they condition students to interact with the material a certain way.

Instead of using trigger warnings, contextualizing work—putting the upsetting material into perspective and explaining why the class is covering this material—seems more effective than giving a trigger warning for two reasons. The first is the one most talked about the media: it tells students who have survived traumas or who are sensitive to certain topics to prepare or excuse themselves from material that might be too upsetting. The second reason I have found seems more important. It shows that professors care about their students and their students' past experiences. Students want professors to have an interest in and respect for their past. A professor asking a student if everything is all right after a difficult class or working with them to get through upsetting subject material is extremely valuable. Contextualization acts as a professor telling the class, "I want to help you learn this material in the way the works for you."

So What?

This research offers descriptive empirical evidence to consider in my following two legal analysis; it offers a conception of how speech work in a college classroom that can be analyzed using a First Amendment framework. Trigger warnings are likely ineffective for treating PTSD and usually not intended just for students who suffer from PTSD. Instead, their intent is connected to forwarding the pursuit of truth. This often translates into a kind of accommodation for those who have suffered trauma, such as sexual assault, in hopes of helping these students engage with their education. Trigger warnings often prioritize certain traumas over others. There is evidence, though it is far from conclusive, that trigger warnings add to a culture where nontenured faculty are unintentionally encouraged to self-censor. The following two legal frameworks will use the above evidence in their analysis of trigger warnings.

First Legal Framework: Are Trigger Warnings a Prior Restraint on a Professor's Academic Freedom?

This analysis focuses on the use of a mandatory trigger warning policy. The option for a professor to use a trigger warning does not pose constitutional questions. Professors frequently give 'head's up' before content, either as a trigger warning or under another name. To analyze a professor's First Amendment rights, I pose an extreme hypothetical policy that combines the language of Oberlin College's shelved Sexual Offense and Resource Guide, and the mandatory aspect of the University of California at Santa Barbara student senate policy.³⁸ This policy would mandate trigger warnings for a wide range of content, and would encourage (though not require) professors to remove triggering material that did not directly add to course goals. I argue under this policy trigger warnings unconstitutionally abridge a professor's academic freedom.

This policy has never been proposed, but extreme policies provide a good test of legal boundaries. This debate asks whether trigger warnings could ever violate First Amendment rights. Some proponents of trigger warnings argue this type of policy is fear mongering. This type of trigger warning policy is highly unlikely to be instituted; why analyze such an improbable policy? Establishing that trigger warnings in certain context can infringe on academic freedom adds to our understanding of less severe policies. An extreme case study provides a circumscribed area to consider what would be constitutional.

Academic Freedom and the First Amendment

³⁸ The full language of both policies is in the appendix.

Though not explicitly stated in the Constitution, the Court has long ruled academic freedom is protected under the First Amendment. In *Tinker v. Des Moines* (1969) the Supreme Court majority wrote “students don’t shed their constitutional rights at the School House gates,” establishing the school or University as a space like any other where speech is protected. The debate over academic freedom has evolved away from the rights of students to questions of a professor’s speech. Though Court precedent has established the classroom as a fundamental contributor to the market place of ideas and a democratic society,³⁹ the Court does not have a strict set of principles of how to define constitutional freedoms in a school.

The Court’s doctrine on academic freedom is not guided by singular rules like the Lemon Test in religious freedom or the Brandenburg principle used to interpret the speech/action dichotomy. While it protects academic freedom, the Court also allows university policies that promote an effective, safe learning environment. The Court tends to protect *what* teachers teach, but not *how* they teach it. I define “what” a professor teaches as the academic material and discussion, and teaching methods they use in class. I define “how” a professor teaches as their expression in a classroom that is unrelated to academic goals. Which category trigger warnings fall into is an important disagreement between opponents and proponents of trigger warnings.

The University Cannot Regulate What a Professor Teaches

Assigning academic material that is seen as obscene or offensive by students or administrators is not a constitutionally permissible reason to dismiss a professor. In *Sweezy v. New Hampshire* (1957) the Court ruled the government could not subpoena a professor based on classroom lectures that support Communism. Paul Sweezy, a professor at the University of New Hampshire, was an active member of the Progressive Party and condemned the US government’s use of violence to maintain Capitalism abroad. The Court ruled the importance of the free flow of ideas in the classroom outweighed the government’s compelling interest for whatever political

³⁹ *Parducci v. Rutland* No. 3072-N. 316 (1970)

information *Sweezy* may hold. Subpoenas have a chilling effect on speech at the university. Other teachers will think twice before voicing controversial political views. *Sweezy* prohibits government restrictions on free speech, not university restrictions, but the ruling set the stage for the protection of a professor's academic speech in the classroom in future cases.

In *Parduci v. Rutland* (1972) a high school English teacher taught the short story "Welcome to the Monkey House." The principle did not rehire the English teacher, in large part because he and the school board found the short story inappropriate and offensive, arguing the work supported free sex and encouraged the killing of the elderly. A district court, settling in favor of the teacher, ruled the short story contributed to learning in the classroom. The District Court cited that only one student asked for an alternative assignment to this reading; most students greeted the assignment with apathy. The ruling set a precedent that academic material cannot be excluded from classrooms because it may be obscene or upsetting to some students and administrators. Though one student did ask to be excused from the assignment, the feelings of one student cannot change the curriculum for the class as a whole. Academic material cannot be removed based on the effects it has on individuals.

The Sixth Circuit Court reinforced this conception of academic freedom in *Hardy v. Jefferson Community College*. A college professor's contract was not renewed after he used the word "nigger," "bitch," and other derogatory terms to analyze how the words allowed dominant social groups to oppress minority groups. While most students found the discussion unoffensive and academically strong, one student complained to administration. The Court ruled his dismissal violated the professor's First Amendment right to speak on matters of public concern without retaliation from the University. The decision continued to build on the foundation that a student's or administrator's discomfort with academic material was not a constitutionally permissible reason to alter classroom material. The Court acknowledged these words were "socially controversial," and the school had an interest in regulating "controversial speech that only further(s) private interest (and that this speech is) not protected under the First Amendment." In the case, a private interest is the self-interest of the teacher, which is distinct

from the interest of communicating course concepts that also benefits the students. The Court ruled the professor was not furthering a private interest, but communicating course concepts.

“Because the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of ‘public concern.’” A matter of public concern is material that relates to political, social or other concerns in the community. The Court acknowledged these matters are often upsetting, but they are necessary in the pursuit of truth.

Permissible Restrictions on Professors’ Speech

A teacher’s right to speak is by no means unlimited. It is constitutional to dismiss or deny tenure to teachers who verbally belittle other professors and have nonphysical relationships with students that are seen as too intimate.⁴⁰ These regulations are not about academic materials, but about how a Professor communicates with his students’ and how he acts in his work environment. The University has a compelling interest to create a safe learning environment, which the Court has repeatedly acknowledged.

In *Clark v. Holmes* (1972), the Court ruled a teacher’s dismissal was constitutional because he jeopardized an effective learning environment. The teacher counseled students in what the school deemed an inappropriate manner, and continuously created tensions with his colleagues and superiors. “We do not conceive academic freedom to be a license for uncontrolled expression (at the expense of) the functioning of the institution.” Freedom of speech did not outweigh the need for a University to function effectively. This behavior— how the teacher was teaching— may be expressive, but the Court has never argued all expressive behavior is protected under the First Amendment. In *Clark*, the Court established a list of compelling interests that outweigh a professor’s right to speak.

⁴⁰ *Clark v. Holmes*, OK 18, 120 P. 642, 31 Okla. 164. 1972.

(1) the need to maintain discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to curtail conduct which impedes the teacher's proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence.

The closest the list comes to regulating academic material is “the need to curtail conduct which impedes the teacher’s proper and competent performance of his daily duties.” The key word is conduct. Trigger warnings are not a form of conduct, as I will argue later.

In more recent decades, the Court has upheld limits on a teacher’s nonacademic speech. In *Dambrot v. Central Michigan University* (1995),⁴¹ a coach could constitutionally be dismissed for using words such as “cunt,” “pussy,” “nigger,” and “fuck” in a locker room before a football game to rev up his team. The words, the court ruled, were “inconsequential to the message conveyed (and) failed to advance an idea transcending personal interest or opinion”. The Court again focuses on how the coach is communicating his academic goal, not what is being communicated. Getting his team excited for the game is fine. Unnecessary profanity that disrupts the learning environment is not.

The constitutional question is if, under my hypothetical policy, trigger warnings effect how a professor teaches or what a professor teaches. The previous cases illustrate offensive language can be limited when it does not further academic goals. However, the decisions in *Hardy v. Jefferson Community College* (2001) and *Parducci v. Rutland* (1970) show offensive language or disturbing ideas that further academic goals cannot be restricted. How do we determine if trigger warnings are part of the “how” or restricting the “what?”

⁴¹ *Dambrot v. Central Michigan University* (1995) FED App. 0168P (6th Cir.)

Empirical Data

Many of these constitutional questions depend on whether trigger warnings actually promote an atmosphere where professors self-censor, impacting the “what,” or whether trigger warnings accomplish their intended goal of helping students engage with their education, improving the “how.” My research, which is detailed at greater length earlier in this paper, suggests trigger warnings add to an environment that cause nontenured professors to be nervous about what they teach, and that trigger warnings are generally ineffective at dealing with trauma.

While tenured faculty have potential motivations to self-censor as well—salaries and promotions are linked to positive course evaluations; most professors would like a good reputation—nontenured professors are more vulnerable because their jobs are at stake. Though very few nontenured faculty said they self-censored or were afraid to teach certain content, tenured faculty and other sources argued adding a trigger warning will restrict what is taught. Especially ambitious nontenured professors will avoid material that might cause students to complain or not participate.⁴² Greg Lukianoff writes that trigger warnings create, “a freedom *from* speech” in the classroom that, in an effort to keep up with all the potentially triggering material, will create a sanitized learning environment that changes how students approach material. “Candor, discussion, humor, honest dialogue and free speech are impaired.”⁴³

As I mentioned earlier, a recent op-ed that went viral on *Vox* seemed finally to justify professors’ fears. Writing under a pseudonym, a self-proclaimed “liberal professor” said his liberal students terrified him. He was afraid to teach certain material because of the outrage he might provoke. He has shifted his teaching materials to avoid triggering content over his years as a professor and argued “rocking the boat” in higher education is suicidal for a faculty member seeking tenure. The article described an adjunct professor whose contract was not renewed after

⁴² Committee A on Academic Freedom and Tenure, “On Trigger Warnings,” *Reports and Publications*. American Association of University Professors, August 2014. <http://www.aaup.org/report/trigger-warnings>

⁴³ Lukianoff, Greg, *Freedom from Speech*. Encounter Books, Sept 9 2014. Print.

students complained he taught “offensive” texts written by Mark Twain and Edward Said. Of course, one case does not prove a trend. A response article also published on *Vox* argued the essay was so well received because it felt right.⁴⁴ It proved something professors wanted to be true—that students’ demands are suppressing speech in higher education. But, this is by no means undeniable proof that professors are more likely to self-censor in 2016 than they were in 1986.

Still, my research suggests trigger warnings add to an environment that make nontenured faculty more hesitant about what they teach. Multiple stories from professors suggested small shifts in academia kept professors, especially those without tenure, on the hyper alert for material that could be upsetting. Trigger warnings are just a small part of this dynamic however. Outraged political sentiment from students can white wash complex issues. Many students I spoke with, especially underclassmen, rejected gray areas on topics like racism, sexism, mental health, and other controversial topics. Some bristled at arguments counter to their own beliefs. Trigger warnings signal that material is wrong or amoral, which creates a greater sense of safety. We know this material is morally wrong or disrespectful; now we can discuss it with that in mind. If the material was too troubling, such as depictions of brutal rape, students and some nontenured professors suggested it should be removed all together. This fervor has paved the way for not only trigger warnings, but the modern hypersensitive atmosphere of the college campus. This environment may put nontenured professors in a precarious position, which will cause them to remove certain material from their syllabi.

Prior Restraint

The above evidence suggests a professor may choose not to teach something, even with a trigger warning, to avoid back lash from students. For example, a nontenured professor I

⁴⁴ Taub, Amanda. “I was a Liberal Adjunct Professor. My Liberal Students didn’t Scare Me at All,” [vox.com](http://www.vox.com/2015/6/5/8736591/liberal-professor-identity) 5 June 2015. Accessed 3 Nov 2015. Web. <http://www.vox.com/2015/6/5/8736591/liberal-professor-identity>

interviewed said they “know better” than to teach a film with a graphic rape scene. The potential risk for the rape to upset or disturb students was more pressing than the academic value of any film as a whole. This type of self-censorship—removing academic material from syllabi to avoid conflicts with students— is considered especially dangerous to First Amendment rights.

Even more so than criminal statutes against speech, there is a special presumption under the First Amendment against the use of prior restraints (Stone 139).⁴⁵ Speech suppressed through a prior restraint never makes it to the market place of ideas, while speech punished after the fact does. The University has more power with prior restraints than subsequent punishments because subsequent punishment requires law suits and effort (Stone 152). A prior restraint can cause an abridgment of speech without the administration lifting a finger.

Near v. Minnesota (1931) established that prior restraints too often amount to censorship. The few permissible uses of prior restraints concern matters of national security such as publishing the location of troops before battles. In cases not related to national security, prior restraints allow the government to be the judge, jury and executioner on what material is obscene and acceptable, placing the burden of proof on the speaker.

In *Lovell v. Griffin* (1938), the Court built off *Near*, establishing that prior restraints were too vague, over inclusive, and chilling because it punished speech not yet spoken. Even if the discretion and power of this hypothetical policy was never really abused by the University, professors might choose to restrict what they teach. For example, a professor’s fear of complaints from students such as the student in *Jefferson Community College* might lead them to remove material that might otherwise contribute to learning. A desire for tenure and being liked by their students may influence their academic goals and lead to freezing self censorship.

Content Neutrality

⁴⁵ Stone, Geoffrey R. *The First Amendment*. Gaithersburg: Aspen Law & Business, 1999. Print.

By their very nature trigger warnings are not content neutral because they single out certain ideas. The Court has set a higher bar for speech restrictions that are not content neutral. When deciding the constitutionality of content based restrictions, “the Court usually will not ask whether the government has a sufficient reason to treat speech of one kind differently from speech of another; rather, the Court will ask merely whether the government has a sufficient reason to restrict the speech affected.”⁴⁶

For example, pornography can be restricted at public libraries. This is a constitutional content based restriction because there is, in the eyes of the Court, such a compelling interest to keep pornography from children.⁴⁷ The plurality based their decision largely on the library’s role in society, which is to “(facilitate) learning and cultural enrichment.” Furthering the mission of the library did not depend on pornography. The library was given discretion about what material would best further their mission. In contrast, the free flow of ideas is the primary purpose of the University. If, as my research suggests, they are part of an environment that encourages silence, trigger warnings contradict the university’s goals. A student watching porn in a public library is not accessing the high-value speech protected in the university. While pornography may add to the search for truth in its own way, the university is an institutionalized search for truth prized by the Court.

The Slippery Slope

The slippery slope, an argument used both in constitutional and in many other forms of argument, argues an action or series of action will inevitably lead to unforeseen, unintended, and potentially worse results: A person wants to take two steps down a mountain, but find them

⁴⁶ Kagen, *The Changing Faces of First Amendment Neutrality*, 1992 Sup. Ct. Rev. 38-40.

⁴⁷ *United States v. American Library Association Inc.* (02-361) 539 U.S. 194 (2003) 201 F. Supp. 2d 401, reversed.

selves tumbling all the way to the bottom. The Court does not have a clear doctrine on the slippery slope argument. Sometimes their opinions rely on it, sometimes their opinions reject it as distracting from the real case issues. In campaign finance cases conservatives regularly rely on the slippery slope argument. If we limit corporate speech what comes next? While the liberal justices reject the slippery slope fear in campaign finance, they have used it in other cases. In Justice Souter's dissent in *NEA v. Finley* (1998), she argued the majority ruling could lead to a slippery slope of government censorship. Perhaps any criteria for government funding could be constitutional, including an artist's political leanings. Are critics of trigger warnings rightfully afraid of a slippery slope? If this section's hypothetical policy was enforced, would trigger warnings advocates push the envelope farther? Could students refuse to take a required class because they found it upsetting?

The definition of what is triggering is constantly expanding. What first was just about sexual assault now includes ideas such as colonialism, racism, suicide and ableism. Many point to Oberlin's extensive list of triggering materials as evidence of their vague and boundless breadth. How do we distinguish between material that is traumatic and material that is merely discomforting? How does a changing definition of trauma and risks of over inclusion play into the constitutionality of trigger warnings? In efforts to be hypersensitive, will professors stumble into a space where they can't teach at all?

Proponents of trigger warnings have argued the slippery slope argument is fear mongering, scaring people away from a benign policy. The legal argument against the slippery slope is that it is not the Court's job to decide cases that are not before them. For example, the Court is considering a mandatory trigger warning policy, not a ban on certain academic materials in the classroom. Instead of predicting what a University would do in a highly unlikely scenario, the Court should rule on the policy before them. One could argue everything has a slippery slope. We accept a police force though it could be the first step to a police state. We accept some form

of search and seizure though it could lead to boundless governmental control.⁴⁸ Worrying about all possible, however radical next steps paralyzes change.

However, the slippery slope argument should not be totally written off in this case. The attitude-altering slippery slope theory suggests people are affected more by what a law says over what it does (Volokh 1036). People may be more weary of trigger warnings and their use because the Court has ruled that in certain instances they violate academic freedom even if such a ruling does not alter the behavior of the majority of professors. On the other hand, if this policy was constitutional, people's attitudes may become more accommodating to trigger warnings and future university policies would build off this ruling. Especially with a lack of clear principles guiding academic freedom, a decision in favor of this policy could set a legal precedent on a university's control over a professor's speech.

Conclusion

Trigger warnings add to an environment that is already inhospitable to nontenured professors. A policy that requires trigger warnings may well cause professor to self-censor. Fear of dismissal and reprisals from students, and the steep ambiguity of when to use trigger warnings, would affect professors. This extreme, nonexistent policy illustrates that trigger warnings, in certain cases, can violate First Amendment rights. However, in most cases trigger warning policies are not this extreme. The trickier questions are policies that are not mandatory; this is a far harder question to answer.

Trigger warnings do not intentionally restrict a professor's speech; indeed they hope to add to the market place of ideas by giving greater control to students who have experienced trauma. My next legal framework considers how trigger warnings may add to the market place of ideas instead of constricting the flow of information. The pursuit of truth is restricted when a professor self-censors what he teaches in the classroom. The pursuit of truth may also be

⁴⁸ Volokh, Eugene. "The Mechanisms of the Slippery Slope," *Harvard Law Review*. Vol 116: 1029.

compromised if a great number of students feel uncomfortable or even afraid to engage in their education. The next section considers how trigger warnings, if used as an accommodation, might add to the pursuit of truth.

Second Legal Frame Work: Trigger Warnings as an Accommodation for Female Students in Higher Education

Trigger warnings arose as a major phenomena in the feminist blogosphere in the 1990s. The warnings attempted to create a space hospitable to a viewership that often had experienced sexual assault, eating disorders, or other traumas that disproportionately affect women over men. Trigger warnings acted as a head's up; viewers were prepared for the content or could choose not to engage with it. If this content was presented without a trigger warning, blog users reasoned, the suddenness and surprise of the content could trigger.

Trigger warnings have not lost their gendered nature in their move from the blogosphere to higher education in the 2010s. Based on my research trigger warnings are far more frequently used for content associated with female triggers than male triggers. A movie rape scene paved the way to the mandatory trigger warning policy passed by the student senate at the University of California at Santa Barbara. This exemplifies a larger trend. Professors and students use and request trigger warnings for topics like rape and sexual assault at a far higher rate than traumas males are more likely to have experienced, like military combat. This skewed use of trigger warnings strongly suggests they disproportionately affect female students. If they are effective, one could argue trigger warnings are a constitutionally permissible accommodation for women in higher education. However, I will argue that trigger warnings do not reach the bar of either an effective accommodation nor a constitutionally permissible gender classification.

The material most commonly labeled triggering in higher education, such as sexual assault and rape, significantly disproportionately affects women over men. 91 percent of rape and sexual assault victims are female, while 9 percent are male. On college campuses, one in five women compared to one in sixteen men are sexually assaulted during their college career.⁴⁹ In contrast, war and military combat, which is far less frequently labeled triggering, disproportionately affects men. Though the numbers are difficult to calculate, it's estimated around 924,000 veterans are enrolled in higher education; only about ten percent identify as female. After sexual assault and rape, trigger warnings are secondarily aimed at eating disorders, another example of lopsided gender dynamics. Anorexia Nervosa will affect between 1 percent to 4 percent of women in their life time, but only around 0.3% of men.⁵⁰ Bulimia nervosa as well disproportionately affects women.⁵¹

As of 2014, there are about 9.8 million female students and 7.7 million male students enrolled in degree-granting undergraduate institutions.⁵² Based on these numbers, around 2 million students will have experiences with sexual assault during or before their college career as opposed to less than a million who will have experienced war and combat. But, does this numerical difference mean we should prioritize one trauma over another in the classroom? Trigger warnings unintentionally create a hierarchy of trauma that accommodates women over men.

⁴⁹ Fisher, B.S., Cullen, F.T., & Turner, M.G. (2000). *The Sexual Victimization of College Women*. National Institute of Justice, Bureau of Justice Statistics.

⁵⁰ Smink, FR; van Hoeken, D; Hoek, HW (August 2012). "Epidemiology of eating disorders: incidence, prevalence and mortality rates.". *Current psychiatry reports* 14 (4): 406–14.

⁵¹ Pemberton AR, Vernon SW, Lee ES; Vernon; Lee (1996). "Prevalence and Correlates of Bulimia Nervosa and Bulimic Behaviors in a Racially Diverse Sample of Undergraduate Students in Two Universities in Southeast Texas". *American Journal of Epidemiology* 144 (5): 450–5.

⁵² U.S. Department of Education, National Center for Education Statistics, *Integrated Postsecondary Education Data System (IPEDS)*, "Fall Enrollment Survey" (IPEDS-EF:90-99); IPEDS Spring 2001 through Spring 2014, Enrollment component. See Digest of Education Statistics 2014, table 303.70.

This disproportionate effect on women can be taken a number of ways. One, which I will analyze in this section, is that trigger warnings are a constitutionally permissible accommodation for women in higher education. Accommodations are adjustments of typical standards to meet the needs of individuals, often those with disabilities. When so many women have experienced rape and sexual assault, trigger warnings act as a heads up and a form of preparation. Proponents argue this will promote a safe learning environment where women can fully engage in their education. Full engagement by all students adds to the pursuit of truth. A second reading is that the unequal effects between genders are irrelevant to their constitutionality. Though the Court sometimes considers gender when deciding the constitutionality of laws and policies, trigger warnings do not meet the bar of a gender accommodation, as I will argue later. A third analysis, and one which is not irreconcilable with the first two, is that trigger warnings imply a delicacy of woman's psyche compared to those of men. Men do not need the preparation and sense of control offered by trigger warnings to take advantage of their education. On the GI bill thousands of men who had experienced military combat in WWII poured into higher education. Accommodations like trigger warnings were not considered, even though the detrimental psychological effects of war were well known in the medical community in these early post war years.⁵³ History classes where veterans studied war and violence were free of any head's ups. Of course, there have been major cultural and medical shifts in the US since the late 1940's. Since then trigger warnings were largely unknown until they received national attention in the 2010s. Still, even with historical shifts, I argue informally prioritizing women's traumas over men's shapes how we construct gender both in the Court Room and outside of it. Do trigger warnings forward a cultural stereotype of women as psychologically weaker than men? The conception of women

⁵³ Bentley, Steve. "A Short History of PTSD: From Thermopylae to Hue Soldiers have always had a Disturbing Reaction to War," *The VVA Veteran* (2005). Web. Accessed Oct 2015. http://www.vva.org/archive/TheVeteran/2005_03/feature_HistoryPTSD.htm

in a case involving trigger warnings may influence future legal decisions on gender. I will address this in more detail further on.

Before moving on, I want to address why I am considering only binary gender, and not trigger warnings as an accommodation for students of color, transgender students, or students with intersecting social identities. Because trigger warnings are often used for colonialism, racism, and police brutality, they also disproportionately affect students of color over white students. Further, transgender women have a far higher rate of sexual assault than other demographics of women.⁵⁴ However, the Court tends to define gender as binary. It has a history of allowing gender classifications between men and women because of societal differences, but not for transgender people or people of color. For these reasons, my analysis focuses only on binary gender.

Feminist Theory and the Doctrine of Accommodation

The Supreme Court and legal theorists acknowledge women and men are uniquely situated both biologically and societally. An example of a societal difference between men and women is the pay gap; an example of a biological difference is the ability to become pregnant. The Court sometimes allows gender classifications, or laws and policies that treat the genders differently. It is impractical or ineffective, the Court argues, to treat each gender the exact same way. To what extent the law should treat women and men differently is debated between both legal theorists and within the Court. I will define different rates of rape and sexual assault as a societal difference between genders.

The Court reviews gender-based laws with intermediate scrutiny. Gender based classifications must forward an important government interest. This is a less rigorous

⁵⁴Stotzer, R. (2009). Violence against transgender people: A review of United States data. *Aggression and Violent Behavior*, 14, 170-179.

scrutiny process than race-based classifications where the government interest must not only be compelling, but the policy or law must be narrowly tailored and use the least restrictive means to accomplish their goal. Laws that use gender-classifications must only connect gender to the state interest. To do this, the Court considers the likelihood gender will influence a situation. In *Kahn v. Shevin* (1974),⁵⁵ the Court upheld a state statute that provided a property tax exemption to female widows, but not to male widowers. The Court's justification was that there are greater economic struggles for women in the job market compared to men. The real world implications of a "male-dominated culture (deprive women of any) but the lowest paid jobs."

In contrast, the Court ruled in *Craig v. Boren* (1976)⁵⁶ a gender classification was unconstitutional. In *Craig*, an Oklahoma statute differentiated drinking ages between men (21) and women (18) for certain alcoholic beverages. Young men, the state rationalized, received more drunk driving traffic violations than women; the age distinction was a safety measure. The Court found the data that connected gender and age was not strong enough to justify the gender classification. However, the majority opinion did not disqualify any gender classification based on societal differences between men and women. The Court only argued that in this specific case the "predictive empirical" relationship was too "tenuous" to satisfy a gender-based classification. The data used did not represent "a legitimate, accurate proxy for the regulation of drinking and driving (based on gender)." Said another way, the difference between a 0.18% (women) and 2% (men) DUI rate does not prove a causal relationship between drinking and gender. The Court left open the door to gender classifications if a statute could prove a causal relationship between gender and achieving the state's interest. These above examples illustrate that the Court allows some, but not all

⁵⁵ *Kahn v. Shevin*, 416 U.S. 351 (1974).

⁵⁶ *Craig v. Boren* 429 U.S. 190 (1976).

gender-classifications. A constitutional classification must have more than a “tenuous” connection to the important interest.

Two legal theorists, Wendy Williams and Elizabeth Wolgast, have distinct approaches to gender classification. These distinctions illustrate that gender classifications involve more than just proving a connection between gender and the state’s important interest. Wendy Williams argues for a more symmetrical approach to gender, while Elizabeth Wolgast for a more asymmetrical approach. A symmetrical approach to gender, in its purest form, treats both genders identically under the law. Any societal asymmetries between the genders are illusions, overbroad generalizations, or “temporary glitches that will disappear with a little behavior modification” (35). Williams argues, women can’t have it both ways under the law—a symmetrical approach to gender on some issues and an asymmetrical approach to gender on others. Women must consider carefully which way they want to have it. In contrast, Wolgast supports an asymmetrical treatment of gender under the law. Asymmetrical approach promoters rationalize that gender differences, whether biological or societal, are a reality that can’t be ignored. Elizabeth Wolgast argues women deserve “special rights” for their “special needs” (36) under the law.⁵⁷

The 1990 American’s with Disabilities Act (ADA) requires institutions of higher education to offer accommodations for students with disabilities.⁵⁸ Psychological disabilities, such as depression, anxiety and PTSD, are covered by the ADA in almost all colleges’ interpretations of the Act. Accommodations’ purposes are to increase accessibility to education. Typical accommodations for psychological disabilities include extra time on tests and attendance modification policies. Trigger warnings are currently not considered a form of accommodation by Oberlin or any other college I know of. However, the definition of accommodation and disability is

⁵⁷ Ed. Katharine T. Bartlett, Roseanne Kennedy. *Feminist Legal Theory: Readings in Law and Gender* (1991). Boulder: Westview Press. Print.

⁵⁸ ADA: Americans With Disabilities Act of 1990, Pub. L. No. 101-336, § 1, 104 Stat. 328 (1990).

always evolving. For example, psychological disabilities have only gained significant acceptance in the last 15 years, where before they were distinguished as less than disabilities such as those related to physical mobility. Because schools' interpretation of the ADA continues to evolve, it is feasible trigger warnings could become an accepted accommodation.

Elizabeth Wolgast

Elizabeth Wolgast's approach to gender might be favorable towards trigger warnings as a form of accommodation. She finds it essential the law acknowledge, react to and, if necessary, accommodate women, even if means infringing on free speech. She argues pornography should be regulated because it implies the inferiority and supports the disrespect of women. She asserts respect for other individuals is part of the US constitutional heritage; protection of expression should not automatically trump this value of respect. She goes on to say the First Amendment was designed to protect speech that argues, not speech that disrespects. Pornography does not forward an argument, but degrades women for the sake of pleasure. Human dignity should not be lost to the infallible "idol" of the First Amendment. Finally, she argues the burden of proof—proving that harm or injury has been caused—should not immediately fall to the injured person (433).⁵⁹

Despite the overlaps between First Amendment rights and gender accommodation, Wolgast's argument on pornography is not appropriate for a legal discussion of trigger warnings. For one, pornography is not equatable to the academic material targeted by trigger warnings. Academic content is protected as high value speech, while pornography is not protected to the same extent.

⁵⁹ Wolgast, Elizabeth. "Pornography and the Tyranny of the Majority," *Feminist Jurisprudence* (1993). Ed. Patricia Smith. New York: Oxford University Press. Print.

Secondly, even if pornography was equatable to academic material, the value judgement Wolgast makes is flawed . Wolgast argues the idol of absolute free expression, in whatever form it comes, must consider what is respectful to listeners as well as the rights of the speaker. “(The) terms of the issue as I frame it require only the value of individual respect, which is part of (the US’s) moral heritage, and the perceptions by members of the community about how they are respected” (442). She goes on to say, the First Amendment is not supposed to protect any type of expression, but the free exchange of ideas (434). Proponents of trigger warnings argue they are increasing the free flow of ideas; female students feel more willing to communicate when they are better prepared for potentially disturbing material. From Wolgast’s perspective, trigger warnings can be seen as simply a respectful tool that increases the flow of ideas and helps preserve the moral obligations that, Wolgast argues, is implied in the Constitution.

Wolgast’s argument is based on the assumption that she knows how all listeners of a certain demographic will react to a certain type of speech. Women are oppressed, exploited and degraded by pornography. Victims of trauma can engage in their education if a teacher gives them a trigger warning. This blanket statement about how a group will react may be on rocky footing even with pornography; the assumption is even more imperfect when it comes to something as complex as trauma. One cannot easily identify what material will trigger. Secondly, one cannot assume a trigger warning is a helpful and respectful tool that increases the flow of ideas. The results of my research question trigger warnings effectiveness and illustrate the effects of trauma can be unpredictable. An accommodation that has the potential to infringe on First Amendment Rights cannot be based on such a tenuous connection to helping students learn.

Wendy Williams

Wendy Williams may hesitate to see trigger warnings as an accommodation for women. She argues of gender accommodations, “(women) can’t have it both ways; we must think carefully which way we want to have it” (18).⁶⁰ Williams connects the law directly to the perception of women in society. If the law constructs women as in more need of accommodation than men in some situations, it becomes more difficult to argue they are absolute equals of men in other situations. Trigger warnings may contribute to a view of women as psychologically fragile compared to men. Taking this possibility to its extremes, trigger warnings support the image of women as less capable of handling trauma than men—women are overly sensitive, mentally weak, and unable to handle their emotions.

Wendy Williams argues Court decisions reflect society’s cultural views on gender. “The way courts define equality, within the limits of their sphere, does indeed matter in the real world. Court decisions are inseparably connected to cultural values” (15). The Court frequently upholds law that exclude women from traditionally masculine spheres, like the draft.⁶¹ It relies on culturally accepted gender roles, enforcing and adding to our cultural understanding of what is masculine and what is feminine. In *Rostker v Goldberg* (1981), domestic life and family were constructed as a feminist sphere. The Senate Armed Services Committee Report, which supported the exclusion of women from the draft, argued sending women into combat places “unprecedented strains on family life.” A women is inseparable from her role as mother; she is tied to the feminist sphere of family, while the father can prioritize combat over his role as a father. The report further argued enlisting women in combat

⁶⁰Williams, Wendy. “The Equality Crisis: Some Reflections on Culture, Courts, and Feminism,” *Feminist Legal Theory: Readings in Law and Gender* (1991). Ed. Katharine T. Bartlett and Rosanne Kennedy. Boulder: Westview Press. Print.

⁶¹ *Rostker v. Goldberg*, 453 U.S. 57 (1981).

roles would affect the national resolve to go to war. The want to protect women would override the country's desire to accomplish their military ends (19).

In *Michael M. v. Superior Court of Sonoma County* (1981), the Court constructed men as the only perpetrators in statutory rape cases.⁶² A seventeen and a half year old male had sex with a female under the age of 18, violating a California state statute that criminalized underage sex for men, but not for women. The Court ruled the statute's gender distinction did not violate the Equal Protection Clause because women have a natural incentive to avoid sex (pregnancy) while men do not. Men initiate sex. Women, the Court suggested, do not. To Williams, the decision forwarded the idea of the man as the aggressor and the woman as sexually passive, as she is culturally expected to be. In both these cases, the Court and culture work in a positive feedback cycle, one adding to the constructed image of gender relied on by the other.

Avoiding stereotypes cannot be the Court's priority. I mention the above cases to suggest, as many before me have, that the Court is not isolated from cultural constructions of gender, just as the outside world is not isolated from how gender is constructed inside the Court room. While this is not a legal argument, the Court, and those who shape the law generally, should be weary that the precedent set in a case on trigger warnings adds to a legal and cultural perspective on women. Seeing trigger warnings as a constitutional accommodation of women's varied experiences may shape future decisions on gender differences. It may further what some call the "protective doctrine," where "women's perceived differences from men (operate) to exclude women from the 'public' or market sphere—to set them apart, outside of the main avenues of power and economic dependence" (Williams 220).

This brings us back to Wendy Williams's argument—"We can't have it both ways, we need to think carefully about which way (women) want to have it." A new

⁶² *Michael M. v Superior Court of Sonoma County* 450 U.S. 464 (1981).

case on the draft could refer to a Court decision finding, for example, on a trigger warning policy of accommodation for female students as constitutional. The state and society have accepted women as more susceptible to trauma and upset. This gender difference could threaten the cohesion of an army unit. Men may just be more capable of dealing with the psychological burden of on the ground combat. A legal and cultural concept of women as requiring more psychologically based accommodation would be a point against gender-neutralizing the draft.

A legal construction of women as psychologically fragile could also influence other cases, such as the legality of equal pay. Perhaps pay inequality is not the result of internalized societal prejudices, but the natural result of women being less qualified for certain high stress position than their male colleagues. To Williams, some gender accommodations forward the notion both inside and outside the Court room that women have a unique place from men in our society.

Conclusion

Trigger warnings as a constitutionally permissible accommodation is a tricky concept. To a great extent, the argument would rely on whether trigger warnings are effective, that is if there is causality between using trigger warnings and helping students learn. Causality could not be proven in *Boren v. Craig*, but could be in *Kahn v. Shevin*. Based on my research, trigger warnings are far more used for content on rape, sexual assault, and eating disorders, which disproportionately affect women. However, my research suggests trigger warnings, though they may be helpful to some students, are not proven and effective accommodations unlike extra time on tests Professors and even victims of trauma don't always know what is triggering. Even if there was a effective way to identify triggering material, there is still no guarantee trigger warnings

will be effective to all or even some students. Further, despite the disproportional use of trigger warnings for rape and sexual assault, it is difficult to prove trigger warnings are more helpful to women than to men. It would be extremely challenging to prove a causal relationship between an effective accommodation strategy for women and any systematic use of trigger warnings in a classroom. In the case of this tenuous relationship, legal questions of free speech should be prioritized over efforts at accommodation. As a result, a professor's choice to use a trigger warning as a wish to accommodate female students in contrast to a professor's choice to use a trigger warning for experimental purposes does not matter to the law. What matters is that it was the professor's choice to use the warning.

Elizabeth Wolgast may not be satisfied with my reasoning. As she argues, being a respectful human being, such as the courtesy of using trigger warnings, shouldn't be abandoned to the idol of free speech. However, pornography cannot be equated to academic material and Wolgast's assumptions about the effects of speech cannot be extended to something as complex as trauma. On the other hand, Wendy Williams may support my conclusion. This legal framework promotes a professor's choice over a gender accommodation. This conclusion does not forward a construction of women as psychologically fragile or less capable of handling trauma than men, and is a symmetrical approach to gender. I agree with Wendy Williams' caution about how we construct women; a psychologically fragile conception of women can have both legal and cultural ramifications. The trigger warning debate, both on the legal and cultural side, may be unintentionally forwarding this conception of women.

Conclusion: What would be Constitutional?

While there are many legal and sociological questions this paper not address, the two legal frameworks analyzed well illustrate the complexities of trigger warnings in higher education. It is not just a cut and dry case of First Amendment rights, but also one that raises questions about the complexities of trauma, societal gender differences, and the changing landscape of higher education. The relationship between trigger warnings and the First Amendment is more nuanced than many on either side of this contentious debate believe. Trigger warnings can intersect and in extreme cases infringe on First Amendment rights. However, trigger warnings are not automatically a barrier to the free flow of ideas and the pursuit of truth in the classroom. Of the two frameworks considered, the first holds more water than the second as a legal argument. The mandatory trigger warning policy considered threatens the academic freedom prized by the Supreme Court. The potential for self-censorship—especially for nontenured faculty—has the potential to impede the free flow of ideas and, as a result, the pursuit of truth. It would be unconstitutional.

The second legal framework, though, carries less legal weight. There is not significant evidence trigger warnings are effective as an accommodation. In this case, legal questions of a professor's First Amendment rights should be prioritized over legal requirements to provide a possible accommodation for women in higher education. Though the second framework does not provide a strong legal argument in support of trigger warnings, it exemplifies how cultural considerations become entangled in legal questions. Specifically, constructions of gender are involved in the trigger warning debate. Though a gender classification in this context is unconstitutional in the face of First Amendment rights, it illustrates how constructions of gender influence both Court decisions and how we perceive gender outside the Court Room. Particularly, this debate may forward a conception of women as psychologically more fragile than men.

The law's complex relationship to culture is evident in both of my legal frameworks. The general relationship between culture and law is a monstrously large topic that this paper did not address. Even defining the two terms could take pages. Still, the challenge to separate culture from the law is crucial. While one can argue the two concepts can never truly be separate, the compulsory use of trigger warnings verse the optional use of trigger warnings helps differentiate when trigger warnings are a legal question and when they are a cultural question. The compulsory use of trigger warnings in higher education raise legal questions of free speech, while the optional use is more a question of pedagogy, morality and other non-legal disciplines that might fall under the heading of culture. However, the line between mandatory and optional can become blurred even here. While a policy may be optional in name, intense social pressure to use trigger warnings can create a slippery slope where speech may still be suppressed under an optional policy.

The two legal frameworks in this paper offer a platform to construct a trigger warning policy that would not infringe on a professor's academic freedom and could benefit students. As I argued at the beginning of this paper, both sides of this contentious argument want to promote the same concept—the pursuit of truth. The two sides approach this concept from severely different stances.

Trigger warnings provoked rage across a range of interest groups not typically in agreement, such as conservative news bloggers and the American Association of University Professors (AAUP). Trigger warnings struck a cultural nerve that speaks as much to the critics of trigger warnings as to the proponents. The most active critics of trigger warnings see them as a product of a spoiled generation. Critics can reduce the issue to phrases like “kids today” and “in my day, we were never so entitled.” On the other side, proponents, often students, see critics of trigger warnings as adults unwilling to engage with their experiences and arguments. In a generation that promotes collective healing and is constantly searching for validation of their lived

experiences, critics' dismissals of trigger warnings can be worse than a snub. It amounts to an attack on their personal experiences. Writing off trigger warnings as stupid and infantile does not bridge the gap between critics and proponents. Neither does writing off critics of trigger warnings as cold-hearted, stubborn, and old. Or, for some young proponents, the generation old cliché that the older generation "just doesn't understand me!" The issue should not be looked at as a simple question of if we are over indulging college students, but a benefit-risk analysis. Are we helping students? Are we crippling teachers? And, most importantly, are we forwarding the pursuit of truth in the college classroom? A university policy on trigger warnings must keep all three goals in mind.

Trigger warnings should not be solely aimed at students with post-traumatic stress disorder. What can trigger is challenging to predict; environments seem more likely to trigger than general concepts like rape or war. There is little evidence trigger warnings effectively prevent students from being clinically triggered. Also, trigger warnings are often used to acknowledge all students' discomforts and experiences. Focusing only on students with diagnosed and undiagnosed post-traumatic stress disorder is ineffective and may limit the potential benefit of trigger warnings.

Trigger warnings add to an environment that is already inhospitable to nontenured professors in higher education today. Any policy on trigger warnings must seriously consider whether it will encourage professors to self-censor. Any policy that mandates the use of trigger warnings in any form violates the First Amendment. Administrative requirements support an environment in which academic material is handled with plastic gloves, and students are encouraged to complain if material they find discomforting is not marked with a trigger warning. There is a potential slippery slope—students may opt to exclude content that is too triggering; professors then may compromise what they teach to avoid a fight with their class and potentially their

school's administration. When the cherished prize of tenure is increasingly distant for many, another potential pitfall could lead to self-censorship.

If a policy were to encourage trigger warnings, it should not make a laundry list of specific triggers. Specific triggers for individuals are endless—from eggs and bacon, to the color white, to a plethora of other unexpected images, sounds, smells, tastes, and concepts. A specific list of triggering content may also create a hierarchy of trauma. Placing more emphasis on traumas such as rape and eating disorders than traumas such as war and natural disasters frames some life experiences as more important than others. It also suggests certain demographics are less equipped to handle trauma than others. Specifics may unintentionally feed into cultural and legal images of certain groups, such as women.

Good judgement on a case by case basis, for both students and professors, is a better strategy than any specific trigger warning policy. On one side, students have a responsibility to engage in their education as adults. For example, if a student has traumatic experiences with sexual trafficking, maybe the course “Sex Workers” is not for them. Professors as well should be aware of their options. If they are teaching something graphically disturbing, they can consider giving their students a head's up in the way they think appropriate. Both student and professors should communicate and respect one another. Regulating speech and trauma to a short, easily understandable policy is as challenging in higher education as it is in any space. Of course, good judgement is easier said than applied. It is often found through trial and error; for nontenured professors, one mistake may be the end of their career, not a stepping stone to developing good judgement in the classroom.

There is not a one size fits all. This speaks to the complex nature of trauma and pedagogy. It also illustrates the challenges of interpreting First Amendment rights in modern day academia. But, I think it is possible to achieve the precarious balance between accommodating students and protecting First Amendment rights.

Appendix

Full text of Oberlin's Guide:

How can I make my classroom more inclusive for survivors of sexualized violence?

Because all professors will have survivors of sexualized violence in their classrooms, these tips can help ensure a welcoming and supportive environment. They are in no way meant to limit academic freedom or free speech, but rather to provide pedagogical tools to ensure that all course members benefit fully from a class.

- Understand that sexual misconduct is inextricably tied to issues of privilege and oppression.
 - Educate yourself about racism, classism, sexism, heterosexism, cissexism, ableism, and other issues of oppression.
 - Anticipate these issues entering class discussion. Think about how you could support positive ideas and discussions.
 - Invite and accept pushback in the classroom. Being engaged or even challenged by a student on these issues is an opportunity to learn, and to model supportive behavior for students.
- Respect students', colleagues', and guest speakers' pronouns.
 - The Sexual Offense Policy defines sexual offense as “a behavior, which calls attention to gender, sexuality, gender identity or sexual orientation in a manner which prevents or impairs an individual's full enjoyment of educational or occupational benefits or opportunities.” For many, use of incorrect pronouns calls attention to gender in a very inappropriate way, and prevents or impairs their safety in a classroom.

- When possible, don't call roll using names from Presto or Blackboard – allow students to self-identify using preferred names by asking them to sign in or to speak their preferred names.
- On the first day of class, ask *all* students for their preferred pronouns. Memorize them as you memorize names.
- If you realize you used the incorrect pronoun, apologize to the student in private and take steps to avoid repeating that mistake in the future.
- If your class is too large to memorize names and pronouns, avoid using gender-specific language whenever possible. For example, if your instinct is to call on “the guy in the purple shirt,” try instead saying, “you, in the purple shirt.”
- Understand triggers, avoid unnecessary triggers, and provide trigger warnings.
 - A trigger is something that recalls a traumatic event to an individual. Reactions to triggers can take many different forms; individuals may feel any range of emotion during and after a trigger. Experiencing a trigger will almost always disrupt a student's learning and may make some students feel unsafe in your classroom.
 - Triggers are not only relevant to sexual misconduct, but also to anything that might cause trauma. Be aware of racism, classism, sexism, heterosexism, cissexism, ableism, and other issues of privilege and oppression. Realize that all forms of violence are traumatic, and that your students have lives before and outside your classroom, experiences you may not expect or understand.
 - Anything could be a trigger—a smell, song, scene, phrase, place, person, and so on. Some triggers cannot be anticipated, but many can.
 - Remove triggering material when it does not contribute directly to the course learning goals.

- Sometimes a work is too important to avoid. For example, Chinua Achebe's *Things Fall Apart* is a triumph of literature that everyone in the world should read. However, it may trigger readers who have experienced racism, colonialism, religious persecution, violence, suicide, and more. Here are some steps you, as a professor, can take so that your class can examine this source in the most productive and safe manner possible:
 - Issue a trigger warning. A trigger warning is a statement that warns people of a potential trigger, so that they can prepare for or choose to avoid the trigger. Issuing a trigger warning will also show students that you care about their safety.
 - You may hesitate to issue a trigger warning, or try to compose a vague trigger warning, because you feel it might also be a “spoiler.” A trigger warning does not need to give everything away. If you're warning people about the issue of suicide in *Things Fall Apart*, you can write, “Trigger warning: This book contains a scene of suicide...” You don't necessarily need to “give away” the plot. However, even if a trigger warning does contain a spoiler, experiencing a trigger is always, always worse than experiencing a spoiler.
 - Try to avoid using graphic language yourself within the trigger warning, but do give students a hint about what might be triggering about the material. If you say something like, “This movie might be upsetting to some of you,” that can a) sound patronizing and b) lead everyone who's experienced trauma to feel like they

might have a terrible time. Try instead saying, “This movie contains scenes of racism, including slurs and even physical violence, but I believe that the movie itself is working to expose and stand against racism and I think it is important to our work here.”

- Tell students why you have chosen to include this material, even though you know it is triggering. For example:
 - “...We are reading this work in spite of the author’s racist frameworks because his work was foundational to establishing the field of anthropology, and because I think together we can challenge, deconstruct, and learn from his mistakes.”
 - “...This documentary challenges heterosexism in an important way. It is vital to discuss this issue. I think watching and discussing this documentary will help us become better at challenging heterosexism ourselves.”
- Strongly consider developing a policy to make triggering material optional or offering students an alternative assignment using different materials. When possible, help students avoid having to choose between their academic success and their own wellbeing.
- Bring in a guest speaker who can help you make the conversation productive. The [Oberlin College Dialogue Center](#)

is one excellent campus resource for facilitating difficult dialogues.

- Respect your students' personal space and bodily autonomy. Physical touch and feeling one's body controlled is often triggering.
 - If it is *absolutely necessary* to touch a student or direct that student's body, practice active consent. Always, always, always ask.
 - For example, instead of correcting a student's posture without saying anything, say, "Your posture is a little off, do you mind if I adjust your back?"
 - Listen to your students, accept no gracefully.
 - A "no" is not a comment on you personally nor on your rapport with the student.
- Educate yourself on issues surrounding sexual misconduct.
 - Understand that sexual misconduct can affect individuals of any identity.
 - Understand that sexual misconduct affects the Oberlin community.
 - Familiarize your self with current definitions of consent
 - Familiarize yourself with Oberlin College's Sexual Offense Policy
 - Educate yourself on why the word survivor is used in discussion of sexual misconduct instead of victim
 - Keep track of the range of available resources
 - Continue to ask questions and challenge yourself.

University of California at Santa Barbara Student Senate Proposal and
Resolution

**A Resolution to Mandate Warnings For Triggering Content in
Academic Settings (02262014:61) – February 25, 2014**

Resolution #805

by Nikki Calderon & Second: Derek Wakefield

Student Sponsor: Bailey Loverin

Resolution Liaison:

Result: No Status by a vote of: on

Whereas: UCSB CARE (Campus Advocacy Resources & Education) reports that: 1 in 4 college women will be sexually assaulted during her academic career; 1 in 4 women will experience domestic violence; and 1 in 33 men will experience attempted or completed rape. Therefore this is a pertinent and widespread issue that should be acknowledged on campus. (maybe, but this may be better as a separate whereas at the end)

Whereas: Triggers are not limited to sexual assault and violence.

Whereas: Trigger Warnings should be used for content not covered by the rating system used by the MPAA or TV warnings (such as contains violence, nudity or, language).

Whereas: The current suggested list of Trigger Warnings includes Rape, Sexual Assault, Abuse, Self-Injurious Behavior, Suicide, Graphic Violence, Pornography, Kidnapping, and Graphic Depictions of Gore.

Whereas: Triggers are a symptom of PTSD (Post Traumatic Stress Disorder).

Whereas: UCSB Disabled Students Program recognizes PTSD as a disability.

Whereas: Having memories or flashbacks triggered can cause the person severe emotional, mental, and even physical distress. These reactions can affect a student's ability to perform academically.

Whereas: College level courses may contain materials with mature content. These particularly affect students if material is being read in the classroom or a film is being screened, as the student cannot choose to stop being exposed to the material.

Whereas: Including trigger warnings is not a form of criticism or censorship of content. In addition, it does not restrict academic freedom but simply requests the respect and acknowledgement of the affect of triggering content on students with PTSD, both diagnosed and undiagnosed.

Whereas: Being informed well in advance of triggering content allows students to avoid a potentially triggering situation without public attention. Having a trigger warning on a syllabus allows a student the choice to be present gives a student

advance notice of possible triggers and the choice to be present or not instead of having to leave in the middle of a class or lecture.

Therefore let it be resolved by the Associated Students in the Senate Assembled:

That the Associated Students of UC Santa Barbara urge the instructor of any course that includes triggering content to list trigger warnings on the syllabus.

Let it further be resolved that: AS Senate urges the instructor of any course that includes triggering content to not dock points from a student's overall grade for being absent or leaving class early if the reason for the absence is the triggering content.

Let it further be resolved that: AS Senate directs the Student Advocate General Kristian Whittaker to appoint a staff member to review and update the list of Trigger Warnings as needed in collaboration with RCSGD (Resource Center for Sexual and Gender Diversity) and The Women's Center.

Let it further be resolved that: AS Senate direct External Vice President of Statewide Affairs Alex Choate to bring this to the attention of the UCSA Board at the next board meeting and to advocate for a policy change to reflect the directions of this resolution on a UC wide level.

Let it further be resolved that: AS Senate directs AS President Jonathon Abboud to bring this to the attention of the Academic Senate and advocate for a policy change to reflect the directions of this resolution.

Let it finally be resolved that: AS Senate recognizes the support and passing of this resolution as a stronger stance taken by UCSB against issues of sexual harassment and violence.

Fiscal Impact: \$0 from the account.

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Press Summary

This paper explores the legal implications of trigger warnings in classrooms of higher education. It uses two legal frameworks to analyze the First Amendment and Equal Protection concerns raised by this hot button issue. By illustrating the legal complexities of trigger warnings, this paper demonstrates the legal nuances of this new phenomenon.